

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7453

In The
United States Court of Appeals
For The Second Circuit

KAHLMAN LINKER and DYNAMISMM.

Plaintiffs-Appellants.

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
DEAN WITTER & CO., INC., GOLDMAN, SACHS & CO.,
WALTER F. BAUER, WERNER L. FRANK, FRANCIS V.
WALKER and all other executive officers and directors of
INFORMATICS, INC., as of February 27, 1974, HENRY J.
SMITH, former Chairman and Director, and all other
directors of the EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, as of February 27,
1974, THE EQUITABLE LIFE HOLDING CORP., and all
others whom discovery may show should be named.

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES
WALTER F. BAUER, HENRY J. SMITH and THE
EQUITABLE LIFE HOLDING CORP.

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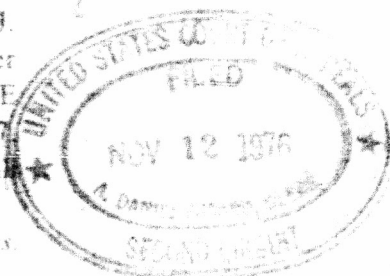


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No. 76-7453

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Plaintiffs-Appellants,

against

MERRILL LYNCH, PIERCE, FENNER &
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STATES, as of February 27, 1974,
THE EQUITABLE LIFE HOLDING CORP.,
and all others whom discovery may
show should be named,

BRIEF FOR DEFENDANTS-APPELLEES
WALTER F. BAUER, J. HENRY SMITH
AND THE EQUITABLE LIFE HOLDING
CORP.

STATEMENT

This is an appeal from an order (A-4a)* of The Honorable Henry F. Werker, United States District Judge for the Southern District of New York, dismissing the complaint on the ground that "Plaintiff [Linker] Pro Se has no beneficial interest in the matter of the merger which is the subject of the complaint..."

(A-4a-5a). The other purported plaintiff, Dynamismmm is a name only according to the complaint, and not a legal entity. (A-52a)**

ISSUES

1. Did the District Court properly dismiss the complaint a) as to plaintiff Linker who was not a shareholder of Informatics, Inc. or Equimatics, Inc. and b) as to Dynamismmm which is not a legal entity, alleging violation of the Security and Exchange Act in the merger of these two corporations?

2. Did the Court below properly, Sua Sponte, dismiss the complaint alleging violation of the Securities and Exchange Act for plaintiff Linker's

*References are to the Appendix.

**As Dynamismmm is not a legal entity, reference to plaintiff will be in the singular.

lack of standing to sue and plaintiff Dynamismmm's
lack of capacity to sue upon the hearing on plaintiff's
motion for a preliminary injunction?

STATEMENT OF CASE

Plaintiff brought this action against various defendants alleging a violation of Section 10 of the Securities and Exchange Act and Rule 10b-5 of the Securities and Exchange Commission. The basis of the complaint* in which plaintiff seeks to set aside the merger of Informatics, Inc. and Equimatics, Inc. is that minority shareholders of Informatics were required to surrender their shares of stock in return for \$7 per share. The complaint did not state that Linker was a shareholder in either corporation at the time of the merger. The complaint states further that Dynamismmm is not a legal entity.

Plaintiff moved for a preliminary injunction rescinding the merger of these Informatics and Equimatics.** At the hearing of this motion the court

*The complaint is not reproduced in plaintiff's appendix.

**The motion papers are not a part of plaintiff's appendix even though plaintiff requests relief as to the disposition of this motion.

dismissed the complaint when it learned that plaintiff Linker was not a shareholder and that Dynamismmm had no legal personality.

POINT I

THE COURT BELOW PROPERLY
DISMISSED THE COMPLAINT
AS TO PLAINTIFF LINKER
AND PLAINTIFF DYNAMISMM

In order to bring an action under Section 10 of the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, a plaintiff must show that he is a purchaser or a seller of stock. The text of the Section and the Rule are set out in the margin.*

*Section 10 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality, of interstate commerce, or of the mails, or any facility of any national securities exchange -

* * *

(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

While a corporate merger has been held to be a purchase or sale within the meaning of Section 10, and Rule 10b-5, one who is not a shareholder of either of two merged companies, does not have standing to sue thereunder. See Simmons v. Wolfson, 428, F.2d 455 (6th Cir. 1970), cert. den'd 400 U.S. 900.

Simmons, supra, was in other ways similar to this action. There a suit was brought under Rule 10b-5 alleging that stock manipulations decreased the value of the stock. The case was on appeal after the District Court granted a motion to dismiss. All stock had been purchased by plaintiffs before the acts complained of were committed. The Sixth Circuit upheld the dismissal

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(a) to employ any device, scheme, or artifice to defraud.

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security."

on the grounds that plaintiffs were not purchasers or sellers in connection with the alleged illegal acts complained of.

In Petersen v. Federal Development Co., 387 F. Supp. 355 (S.D.N.Y. 1974), plaintiff did not allege that he was a purchaser or seller in connection with the tender offer he complained of in his complaint and the court therefore held that he lacked standing to sue under Section 10(b) and Rule 10b-5.

Other cases requiring that plaintiffs be a "purchaser or seller", and limiting standing to sue to this category are Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952).

The foregoing cases are authority for the propriety of the dismissal in our case. Linker has not alleged - nor can he - that he was a shareholder in Informatics or Equimatics at the time of their merger - the transaction complained of - and as a result lacks any standing to sue. Accordingly, any allegation of injury is meaningless as a matter of law. Levine v. J. N. Russell & Co., [69-70 Transfer Binder] Fed. Sec. Law Rep. ¶92,553 (D. Ohio 1969). The remedial purposes of the Federal Securities laws have not done away

with standing and capacity to sue doctrines which limit the jurisdiction of the Federal courts.

Investment Properties International, Ltd. v. I.O.S., Ltd., [70-71 Transfer Binder] Fed. Sec. Law. Rep. ¶93,011 (S.D.N.Y. 1971). There the court denied a preliminary injunction because the individual plaintiff was not a shareholder of the plaintiff corporation and the court determined that the suit would probably be dismissed.

Accordingly, the District Court properly dismissed the complaint as to Linker. He cannot bring this suit absent compliance with the "purchaser - seller" rule. The District Court also correctly dismissed the complaint as to Dynamismmm, since it is a name only and not a legal entity. Linker himself has stated that Dynamismmm is his alter ego (A-52a). It could not sue, and the action brought in its name was a nullity.

Linker acknowledges (plaintiff brief p. 19) that the stock he refers to belongs to his wife and not him. To say, as Linker does, that he has some interest in that stock because his wife's will bequeaths the stock to him is patently absurd.

POINT II

THE DISMISSAL OF THE COMPLAINT
AT THE HEARING ON THE MOTION
FOR A PRELIMINARY INJUNCTION
WAS PROPER

Once the District Court recognized that Linker had no standing to bring the action and that Dynamismmm did not exist, it had no choice but to dismiss the action on its own motion, even absent a motion by one of the defendants. Hence, there was no need to consider the motion for a preliminary injunction. Since plaintiff had no standing to sue, the motion for a preliminary injunction failed.

CONCLUSION

THE ORDER DISMISSING
THE COMPLAINT BELOW
SHOULD BE AFFIRMED

Respectfully submitted,

WERNER WEINSTOCK
Attorney for Appellees
J. Henry Smith and The
Equitable Life Holding Corp.

JACOBS PERSINGER & PARKER
Attorneys for Appellee
Walter F. Bauer

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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- against -

MERRILL LYNCH, PIERCE, FENNER & SMITH,
ET AL..

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452.

That on the 12th

day of November 1976

1. 67 Broad St. New York, N.Y.
2. Bankers Trust Plaza New York, N.Y.
3. 48 Wall St. New York, N.Y.
4. 165 Broadway N.Y., N.Y. upon

deponent served the annexed
brief

1. Kahlman, Linker & Dynamismmm 2. Dean Witter & Co., Inc. 3. Sullivan & Cromwell
parties
the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 12th
day of November 1976

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623100
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E. Thomas

Print name beneath signature

KEVIN E. THOMAS